No. 89-1555

In the Supreme Court of the United States

OCTOBER TERM, 1990

MARK E. DENNIS, PETITIONER

v.

MARGARET L. HIGGINS, DIRECTOR, NEBRASKA DEPARTMENT OF MOTOR VEHICLES, ET AL., RESPONDENTS

On Writ of Certiorari to the Supreme Court of Nebraska

BRIEF FOR AMERICAN TRUCKING ASSOCIATIONS, INC., AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether a claim that state action discriminates against interstate commerce in violation of the Commerce Clause is cognizable under 42 U.S.C. § 1983.

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INTEREST OF THE AMICUS CURIAE

American Trucking Associations, Inc. (ATA) is a trade association of motor carriers, state trucking associations, and national trucking conferences created to promote and protect the interests of the trucking industry. ATA and its members frequently invoke 42 U.S.C. § 1983 in litigation challenging state action that deprives them of their right under the Commerce Clause to engage in interstate commerce free of unreasonable burdens and unlawful discrimination. See, *e.g.*, *American Trucking Associations, Inc.* v. *Scheiner*, 483 U.S. 266 (1987); *Kassel* v. *Consolidated Freightways Corp.*, 450 U.S. 662 (1981); *A.B.F. Freight System, Inc.* v. *Suthard*, 681 F. Supp. 334 (E.D. Va. 1988); *Commonwealth of Kentucky Transp. Cabinet* v. *American Trucking Associations, Inc.*, 746 S.W.2d 65 (Ky. 1988). They accordingly have a substantial interest in ensuring that the remedy set forth in 42 U.S.C. § 1983, and the con-

comitant entitlement to attorneys' fees under 42 U.S.C. § 1988, extend to violations of that constitutional right. ATA filed an amicus curiae brief in *Lewis* v. *Continental Bank Corp.*, 110 S. Ct. 1249 (1990), addressing the question whether Commerce Clause claims are cognizable under Section 1983.[1]

SUMMARY OF ARGUMENT

A. The language of 42 U.S.C. § 1983 is exceedingly broad. The statute provides a remedy whenever state action deprives a person of "*any* rights, privileges, or immunities secured by the Constitution and laws" of the United States (emphasis added). That expansive language plainly encompasses claims grounded in violations of the Commerce Clause. State action that transgresses the Commerce Clause's limitations upon state power deprives persons of their right to be free of burdensome or discriminatory state regulation not authorized by Congress.

Nothing in the legislative history of Section 1983 suggests a different conclusion. The consistent theme of the legislative debates was that Congress intended to safeguard *all* of the rights conferred by the Constitution by creating a federal court remedy for violations of those rights. The legislative history thus confirms that the statute should be interpreted in accordance with its plain language.

B. Despite the broad wording of Section 1983 and the evidence of expansive congressional intent, some lower courts have concluded that Commerce Clause claims fall outside the scope of Section 1983 because in their view the Commerce Clause does not secure "rights" within the meaning of the statute. That view is somewhat puzzling. No one contends that the Clause's limitations upon state authority are merely precatory or advisory; all agree

[1] Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court. See Sup. Ct. R. 37.

that the Clause establishes binding restrictions that may be enforced by injured parties such as petitioner in actions seeking injunctive or declaratory relief. The contention appears to be that the Commerce Clause confers a "second-class" right, sufficiently concrete to be enforced in some kinds of judicial actions, but not concrete enough to be cognizable under Section 1983.

These courts have attempted to justify their exclusion of Commerce Clause claims from Section 1983 by characterizing the Commerce Clause as a "structural" provision of the Constitution that allocates regulatory authority between the federal government and the states, but does not protect individual rights. The flaw in this argument is the rather simplistic assumption that provisions of the Constitution may be divided into two separate groups, those that serve structural ends and those that protect individuals. In fact, the Framers considered the Constitution's structural provisions to be the principal source of protection for individual rights. Dividing authority between the states and the federal government (and dividing federal authority among three separate branches) would " 'diffuse[] power the better to secure liberty.' " *United States* v. *Munoz-Flores*, 110 S. Ct. 1964, 1970 (1990) (quoting *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)).

The Commerce Clause thus serves structural ends, allocating regulatory authority between the states and the federal government, and protects personal rights as well, both indirectly (by diffusing authority) and directly (by freeing individuals from discriminatory or burdensome state regulation not authorized by Congress). This Court has recognized as much, frequently adverting to the "right" to engage in interstate commerce. And the historical record indicates that the Framers adopted the Commerce Clause to protect individuals from unfair regulation by the states.

The rights conferred by the Commerce Clause affect the liberty of American citizens to transact business on a national scale, free from burdens imposed by local legislatures that may be beholden to narrow, parochial interests. These rights are fundamental to the national citizenship the Constitution was established to secure. They surely are protected by Section 1983.

ARGUMENT

SECTION 1983 ENCOMPASSES CLAIMS SEEKING REDRESS FOR VIOLATIONS OF THE COMMERCE CLAUSE

A. The Statutory Language And Legislative History Establish That Section 1983 Extends To Commerce Clause Claims.

The starting point for all questions of statutory interpretation is the language of the statute. The language of Section 1983 makes clear that the provision encompasses claims grounded in the Commerce Clause. The statute's legislative history confirms that conclusion, establishing that Congress created a broad remedy for violations of all rights conferred by the Constitution.

1. Section 1983 provides a remedy when a person acting under color of state law deprives the plaintiff of "*any* rights, privileges, or immunities secured by the Constitution and laws" of the United States (emphasis added). The term "any" generally means a thing "selected without restriction or limitation of choice." When used as a modifier, as in Section 1983, "any" indicates "the maximum or whole of a number or quantity." *Webster's Third New International Dictionary* 97 (1986). Congress's choice of words establishes that this remedial statute has the widest possible compass. "It is difficult to imagine broader language." *United States* v. *James*, 478 U.S. 597, 604 (1986).

Any lingering doubt about the very broad scope of Section 1983 may be put to rest by comparing it to another provision of federal law whose breadth cannot be doubted

—the statute governing this Court's jurisdiction to review state court judgments that rest on federal law. As it stood at the time Section 1983 was enacted, that statute authorized review by this Court in three categories of cases, one of which was cases in which "any title, right, privilege, or immunity [has been] claimed under the constitution," a federal law, or a treaty, and the decision was against the federal right. See Judiciary Act of 1789, 1 Stat. 73, 85, as amended by the Act of Feb. 5, 1867, 14 Stat. 385, 386. This language, which has been retained in the present-day statute (see 28 U.S.C. § 1257), closely resembles Section 1983's reference to "any rights, privileges, or immunities secured by the Constitution and laws." This part of the jurisdictional statute has long been recognized as exceedingly broad, permitting the Court to review decisions with respect to any conceivable constitutional claim, including one under the Commerce Clause. See R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 115 (6th ed. 1986). The parallel language of Section 1983 should therefore be interpreted to provide a remedy for the violation of all rights conferred by the Constitution.

Indeed, this Court already has concluded that Section 1983 "must be given the meaning and sweep that * * * [its] language dictate[s]"; the remedy extends to rights secured by "*all* of the Constitution and laws of the United States." *Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 549 & n.16 (1972) (emphasis in original) (quoting *United States* v. *Price*, 383 U.S. 787, 797 (1966)). See also *Golden State Transit Corp.* v. *City of Los Angeles*, 110 S. Ct. 444, 448 (1989) ("[w]e have repeatedly held that the coverage of [Section 1983] must be broadly construed"); *Monell* v. *Department of Social Services*, 436 U.S. 658, 700 (1978) ("there can be no doubt that [Section 1983] was intended to provide a remedy, to be broadly construed, against all forms of official violation of federally protected rights"); *Chapman* v. *Houston Welfare Rights Org.*, 441 U.S. 600, 663 (1979) (White,

J., concurring) (Section 1983 "protect[s] against state invasions of *any* and *all* constitutional rights") (emphasis in original).

The language of the statute, the clearest guide for ascertaining Congress's intent, thus establishes that Congress intended to encompass all claims alleging violations of rights secured by the Constitution—including those grounded in the Commerce Clause—within the scope of Section 1983. See *Maine* v. *Thiboutot*, 448 U.S. 1, 6-8 (1980) (refusing to limit Section 1983's plain language).[2]

2. The breadth and clarity of the text of Section 1983 eliminate any need to consult the provision's legislative history. See *Davis* v. *Michigan Dep't of Treasury*, 109 S. Ct. 1500, 1504 n.3 (1989) ("[l]egislative history is irrelevant to the interpretation of an unambiguous statute"); *United States* v. *Ron Pair Enterprises*, 109 S. Ct. 1026, 1030 (1989) ("where, as here, the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms' ") (citation omitted); *United States* v. *Locke*, 471 U.S. 84, 95-96 (1985). In any event, the legislative history simply confirms that Congress meant what it said when it enacted Section 1983.

There was no suggestion when Section 1983 was enacted that some constitutional rights were to be excluded from the statutory remedy. Rather, the consistent theme of the legislative debate was that Congress intended to create a general remedy for violations of rights secured by the Constitution. One Congressman stated:

[2] Respondents assert (Br. in Opp. 9) that the Commerce Clause does not create "rights" because its express language does not limit state power, but this Court recently rejected the indistinguishable argument that implied statutory rights are excluded from Section 1983. *Golden State*, 110 S. Ct. at 451 ("[t]he violation of a federal right that has been found to be implicit in a statute's language and structure is as much a 'direct violation' of a right as is the violation of a right that is clearly set forth in the text of the statute").

> The rights, privileges, and immunities of the American citizen, secured to him under the Constitution of the United States, are the subject-matter of this bill. *They are not defined in it, and there is no attempt in it to put limitations upon any of them*; but whatever they are, however broad or important, however minute or small, however estimated by the American citizen himself, or by his Legislature, they are in this law. The purpose of this bill is, if possible, and if necessary, to render the American citizen more safe in the enjoyment of those rights, privileges, and immunities.

Cong. Globe, 42d Cong., 1st Sess. 475 (1871) (Rep. Dawes) (emphasis added). See also *id.* at App. 68 (Rep. Shellabarger); *id.* at App. 81 (Rep. Bingham); *Monell*, 436 U.S. at 683-686 (summarizing legislative history).

Congress expressly recognized that the remedy provided by Section 1983 would extend to violations of the protections set forth in the original Constitution as well as those conferred by the Bill of Rights and the Fourteenth Amendment. Representative Dawes observed that the Constitution adopted in 1789 secured rights, privileges, and immunities "so peculiar that [the American citizen] stood before the world a wonder and a marvel among all the nations of the earth." Cong. Globe, 42d Cong., 1st Sess. 475 (1871). He stated that "when, *in addition to those privileges and immunities thus secured to him*," one added the protections secured by the amendments to the Constitution, he could "hardly comprehend[] the full scope and measure of the phrase which appears in this bill." *Ibid.* (emphasis added). These comments make clear that the statute extended to both sets of constitutional protections.

Other legislators also referred to provisions of the original Constitution in describing the scope of the statute. See, *e.g.*, Cong. Globe, 42d Cong., 1st Sess. 486 (1871) (Rep. Cook) (discussing the Contracts Clause). Most significantly, nothing in the legislative history in-

dicates that Congress intended to treat rights conferred by the original Constitution in general, or the Commerce Clause in particular, any differently from those granted by other provisions of the Constitution.

There is no doubt that Congress's immediate concern—and the principal focus of the legislative debate—was the need to provide a remedy for the southern States' failure to protect the newly-freed slaves against racially-based violence instigated by the Ku Klux Klan. But, contrary to the view of some lower courts (see, *e.g.*, *Consolidated Freightways Corp.* v. *Kassel*, 730 F.2d 1139, 1145-1146 (8th Cir.), cert. denied, 469 U.S. 834 (1984)), that fact does not "create a 'negative inference' limiting the scope of [Section 1983] to the specific problem that motivated its enactment." *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U.S. 669, 679 (1983); see also *Eli Lilly & Co.* v. *Medtronic, Inc.*, 58 U.S.L.W. 4838, 4840 n.2 (U.S. June 18, 1990); *Board of Governors* v. *Dimension Financial Corp.*, 474 U.S. 361, 371 (1986). Congress's choice of general language, together with the legislative history evidencing Congress's broader intent, establish that Congress intended to give the statute a wider compass.

Some courts have excluded Commerce Clause claims from Section 1983 in reliance on a single comment by Representative Shellabarger, one of the principal sponsors of the statute, arguing that because he distinguished between those provisions of the Constitution that "restrain and directly relate to the States" and those provisions that "relate directly to the rights of persons within the States," his statement establishes that Section 1983 provides a remedy only for violations of the latter category of constitutional provisions. See, *e.g.*, *Consolidated Freightways*, 730 F.2d at 1146 n.16. Viewed in the context of the debate, however, it is clear that Representative Shellabarger was not describing a limitation upon the scope of Section 1983.

First, Representative Shellabarger was not even discussing the part of the 1871 statute that contained the predecessor of Section 1983. He had completed his discussion of that portion of the bill (see Cong. Globe, 42d Cong., 1st Sess. App. 68 (1871)), which was contained in Section 1, and turned to Section 2, which made it a federal crime to engage in a conspiracy "to do any act in violation of the rights, privileges, or immunities of another person" that would constitute a federal crime in places under the exclusive jurisdiction of the United States. This provision differed from Section 1983 in that it was not limited to rights, privileges, and immunities created by the Constitution; Representative Shellabarger explained that Section 2 was intended to reach beyond the rights recognized directly in the Constitution to protect the "fundamental rights" that "inhere in citizenship," apparently on the theory that these rights were protected by the Privileges and Immunities Clause. *Id.* at App. 69.

A principal objection to the provision was that Congress lacked the power to enact it, because it infringed upon the powers reserved to the states by overriding their authority to define and punish crimes. See, *e.g.*, Cong. Globe, 42d Cong., 1st Sess. App. 45 (1871) (Rep. Kerr). In responding to this argument, Representative Shellabarger contended that Congress had the power to enforce by legislation all provisions of the Constitution. *Id.* at App. 69 ("Congress is bound to execute, by legislation, every provision of the Constitution, even those provisions not specially named as to be so enforced"). Representative Shellabarger argued that the federal government had always assumed that it possessed the power to enforce the parts of the Constitution that did not expressly confer enforcement authority upon Congress. He recognized, in the passage seized upon in support of the narrow construction of Section 1983, that "[m]ost of the provisions of the Constitution which restrain and directly relate to the States" had been enforced by the courts without federal legislation. *Ibid.*; see also *id.* at App. 70 (absence of prior legislation reflected fact that

it had been deemed unnecessary, not that Congress lacked the power to adopt it). But he noted that other constitutional provisions limiting state authority—the Extradition Clause, the Privileges and Immunities Clause, and the Fugitive Slave Clause—had been enforced by federal legislation. *Id.* at App. 69-70.

This affirmation of *broad* congressional power to create remedies for violations of constitutional rights provides no grounds for a *narrow* interpretation of Section 1983. Representative Shellabarger's comments had nothing to do with his view of the scope of Section 1983; they were an effort to show why the historical record supported his theory that Congress had the power to enforce all of the Constitution's limits on state authority. His statement that Congress in the past had found it unnecessary to enact statutory remedies for violations of some of these provisions does not provide any support for the view that the Congress that enacted Section 1983 intended to limit the scope of that new remedy. Indeed, to the extent it is relevant at all, Representative Shellabarger's comment reveals an expansive view of Congress's role in providing remedies for violations of constitutional rights that supports a broad interpretation of Section 1983.

Even if this "fragment[] of legislative history" could be read to provide some support for a narrow interpretation of the statute, and we believe it does not, it plainly does not constitute "a clearly expressed legislative intent contrary to the plain language of the statute." *American Tobacco Co.* v. *Patterson*, 456 U.S. 63, 75 (1982); see also *United States* v. *James*, 478 U.S. at 612. "[I]f Congress had intended to limit [the statute's] scope * * * it is not unreasonable to assume that it would have made this [limitation] explicit." *St. Paul Fire & Marine Ins. Co.* v. *Barry*, 438 U.S. 531, 550 (1978). When a party invokes legislative history to justify limiting statutory language that is "broad and unqualified," the legislative history must provide "substantial support for limiting language that Congress itself chose not to limit." *Ibid.*

(footnote omitted). The legislative history of Section 1983 falls far short of this standard and accordingly does not justify excluding Commerce Clause claims from the unqualified scope of the statute.

3. Finally, nothing in this Court's precedents supports excluding Commerce Clause claims from Section 1983. Some have suggested that the Court in *Carter* v. *Greenhow*, 114 U.S. 317 (1885), held that the Contracts Clause does not secure rights within the meaning of Section 1983. See 87-1955 U.S. Am. Br. 19 n.19. Even if this characterization of the decision were correct, *Carter* would shed little light upon whether Section 1983 encompasses claims under an entirely different provision of the Constitution. In fact, however, *Carter* does not stand for that proposition.

The plaintiff in *Carter* sought to vindicate the contractual right, conferred by an 1879 state statute, to pay his state taxes with coupons from state bonds. The state refused to accept the coupons, relying on a subsequently-enacted statute that eliminated the payment right. This Court observed that "[t]he rights alleged to be violated are the right to pay taxes in coupons instead of in money, and, after a tender of coupons, the immunity from further proceeding to collect such taxes as though they were delinquent. These rights the plaintiff derives from the contract with the State, contained in the [1879 statute] and the bonds and coupons issued under its authority." 114 U.S. at 322. Because the plaintiff framed the case in this manner, bringing the Contracts Clause into play only in response to the State's argument that a subsequent statute altered the plaintiff's rights under the 1879 statute, the Court concluded that the plaintiff had not alleged the deprivation of a right secured by the Constitution. As Justice Stone later observed, *Carter* "held *as a matter of pleading* that the particular cause of action set up in the plaintiff's pleading was in contract and was not to redress deprivation of the 'right secured to

him by that clause of the Constitution' [the contract clause], to which he had 'chosen not to resort.'" *Hague* v. *CIO*, 307 U.S. 496, 527 (1939) (opinion of Stone, J.) (emphasis added); see also *Chapman* v. *Houston Welfare Rights Org.*, 441 U.S. at 613 n.29 (relying on Justice Stone's explanation of *Carter*).

The same analysis applies to *Bowman* v. *Chicago & Northwestern Ry.*, 115 U.S. 611 (1885). It is not even clear which provision of the Constitution was implicated in that case, because the Court's opinion is silent on that question. In any event, the decision rests on the same pleading technicality as *Carter*. Because the plaintiff alleged a violation of a right conferred by state law and did not allege the deprivation of rights secured by the Constitution, he failed to state a claim under Section 1983. See *Chapman*, 441 U.S. at 658-659 n.27 (White, J., concurring) (claims in *Carter* and *Bowman* were dismissed because the particular rights alleged to have been infringed were not secured by federal law).

In sum, the language of Section 1983, the legislative history, and this Court's prior interpretations of that statute all strongly favor construing Section 1983 to encompass claims resting on violations of the Commerce Clause.

B. The Commerce Clause Creates "Rights" Within The Meaning Of Section 1983.

Some lower courts have concluded that Commerce Clause claims are not enforceable under Section 1983 because the Clause does not confer "rights" within the meaning of that statute. See Pet. App. 5a-18a (discussing decisions). Even if these courts were correct, Commerce Clause claims would not be excluded from Section 1983, because the statute prohibits the deprivation of "rights, privileges, or immunities secured by" federal law. The Commerce Clause surely confers a federal "privilege" to engage in interstate commerce free of burdensome or discriminatory state regulation and a federal "immunity" from such state regulation. In any event, the benefits conferred by the Commerce Clause do qualify as constitutional rights cognizable under Section 1983.

Even the courts that deny that the Commerce Clause creates "rights" do not and could not dispute that the Commerce Clause creates enforceable obligations, for it is settled that a plaintiff may obtain injunctive relief on the basis of a claim grounded in the Commerce Clause. Compare *Wright* v. *City of Roanoke Redevelopment & Housing Auth.*, 479 U.S. 418, 423 (1987) (a statute does not create rights within the meaning of Section 1983 when the statute "indicat[es] no more than a congressional preference—at most a 'nudge in the preferred directio[n],' * * * not * * * ris[ing] to the level of an enforceable right") (citation omitted). Indeed, petitioner obtained such relief in this case. See Pet. App. 3a.

Rather, the view of these courts is that the Commerce Clause simply allocates power between the federal government and the states. Any benefit to individuals as a result of this division of auhtority is "incidental," and therefore too attenuated to give rise to a right enforceable under Section 1983. That conclusion is wrong for several reasons.

1. The well-settled principle that individuals injured by state action violative of the Commerce Clause may obtain injunctive and declaratory relief (see *Bell* v. *Hood*, 327 U.S. 678, 684 (1946)) establishes that Commerce Clause claims also may be maintained under Section 1983. These individuals are entitled to sue for injunctive relief because they are the beneficiaries of a cause of action implied directly under the Commerce Clause. The existence of that implied cause of action, in turn, reflects the determination that such persons are "appropriate part[ies] to invoke the power of the courts" to remedy violations of the rights conferred by the Commerce Clause. "The concept of a 'cause of action' is employed specifically to determine who may judicially en-

force * * * rights or obligations." *Davis* v. *Passman*, 442 U.S. 228, 239 (1979); see also *Bivens* v. *Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 400 (1971) (Harlan, J., concurring) ("a federal court's power to grant even equitable relief [in nondiversity cases] depends on the presence of a substantive right derived from federal law").

Recognition of an implied cause of action for injunctive relief establishes that the relationship between the limits on state authority imposed by the Commerce Clause and the injuries suffered by an individual from a State's violation of those limits is sufficient to permit that individual to bring suit to vindicate the constitutional right. Because such persons are thus within "the class of litigants * * * [that] may use the courts to enforce the right at issue" (*Davis*, 442 U.S. at 240 n.18), they should be entitled to bring suit under Section 1983 as well.

To be sure, Congress could have limited the right to sue under Section 1983 to a class of persons narrower than that entitled to sue directly under the Constitution, but there is no evidence that Congress did so. Certainly this Court has never recognized such a limitation on the scope of Section 1983. And the statute's broad language provides no justification for that result. It imposes liability on every person who "subjects" another to "the deprivation of any" right "secured by the Constitution * * *." Section 1983 does not by its terms require any special relationship between the injured party and the constitutional right.[3]

Moreover, construing the statute to limit the class of potential plaintiffs would be inconsistent with its purpose. Section 1983 was intended to provide a federal

[3] For example, liability under the statute is not limited to persons who deprive another of an "individual" right or of a right secured "to him" by the Constitution.

forum for the vindication of federal rights because Congress believed that the state courts were either unwilling or unable to provide for effective enforcement of those rights. See *Will* v. *Michigan Dep't of State Police*, 109 S. Ct. 2304, 2309 (1989); *Felder* v. *Casey*, 487 U.S. 131, 147 (1988); *Patsy* v. *Board of Regents*, 457 U.S. 496, 503, 506-507 (1982). Congress could not have intended to create a federal forum for all federal rights other than those conferred by the Commerce Clause, relegating the latter to the very state courts that had proven themselves inhospitable to federal claims. But, under the narrow construction of Section 1983 adopted by the Nebraska Supreme Court, a plaintiff asserting a claim under the Commerce Clause in 1872 would have had to bring his lawsuit in state court. See Br. in Opp. 11-12.[4] That result is squarely inconsistent with Congress's purpose in enacting Section 1983. The fact that the Commerce Clause indisputably confers a right on petitioner sufficient to permit him to maintain an implied action directly under the Commerce Clause thus establishes that the Commerce Clause grants "rights" actionable under Section 1983.

This Court's decision in *United States* v. *Guest*, 383 U.S. 745 (1966), provides strong support for the conclusion that the Commerce Clause confers rights cognizable under Section 1983. One question in that case was whether an indictment charging a conspiracy to deprive citizens of the "right to travel freely to and from the State of Georgia and to use highway facilities and other instrumentalities of interstate commerce" stated a violation of 18 U.S.C. § 241, which criminalizes conspiracies to intimidate the exercise of "any right or privilege secured * * * by the Constitution." Relying principally upon the Commerce Clause as the source of the constitutional right to travel, the Court upheld the indictment on

[4] The federal courts were not granted general federal question jurisdiction until 1875. Act of March 3, 1875, § 1, 18 Stat. 470.

the ground that it alleged a conspiracy to deprive citizens of a right secured by the Constitution. 383 U.S. at 757-759. *Guest* confirms that the Commerce Clause secures rights cognizable under Section 1983.

2. Excepting Commerce Clause claims from Section 1983 is wrong for the additional reason that the distinction between "structural" and "individual" rights is wholly illusory. Indeed, the Court rejected such a categorical distinction in its decision last Term in *Golden State Transit Corp.*, holding that a preemption claim—another type of federal right that the lower courts had labeled "structural"—was cognizable under Section 1983. The same result is appropriate here. The Framers did not protect interstate commerce out of whim or caprice; they intended to insulate individuals engaged in interstate commerce against discriminatory and unreasonable state action in the same way that other provisions of the Constitution protect individuals against various categories of government action. That important protection certainly constitutes a right within the meaning of Section 1983.[5]

The fundamental flaw in the argument is the assumption that each provision of the Constitution may be described as either creating rights or as allocating authority in order to serve structural ends, but not both. In fact, of course, a single provision of the Constitution can serve both purposes at the same time. For example, the protection of the Free Speech Clause typically is viewed as conferring a personal right, but the right also is a

[5] This Court's determination in *Golden State* that the Supremacy Clause does not create rights enforceable under Section 1983 has no bearing on the status of Commerce Clause rights. The Supremacy Clause "'is not a source of any federal rights'; it 'secure[s] federal rights by according them priority whenever they come in conflict with state law.'" *Golden State*, 110 S. Ct. at 449 (citation and quotation marks omitted). The Commerce Clause, by contrast, is indisputably a source of substantive federal rights. Indeed, it was the source of the right that led to the invalidation of the state tax statute challenged by petitioner in this case. Pet. App. 3a.

structural one, securing robust political debate in order to promote the political well-being of the Nation.

The same is true of the Constitution's more explicitly structural provisions: "the Constitution diffuses power the better to secure liberty." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). The distribution of powers between the states and the federal government, and among the branches of the federal government, was intended in large part to protect against majoritarian tyranny. See *The Federalist* No. 51, at 321 (J. Madison) (Mentor ed. 1981); *The Federalist* No. 84, at 515 (A. Hamilton). This Court has recognized that the separation of powers doctrine protects individual rights. *Bowsher* v. *Synar*, 478 U.S. 714, 722 (1986); see also *Synar* v. *United States*, 626 F. Supp. 1374, 1403 (D.D.C.), aff'd sub nom. *Bowsher* v. *Synar*, 478 U.S. 714 (1986).

Just last Term the Court squarely rejected a similar argument about "structural" rights, refusing to hold that "compliance with the Origination Clause is irrelevant to ensuring individual rights." *United States* v. *Munoz-Flores*, 110 S. Ct. 1964, 1970 (1990). The Court observed that the Framers divided functions between the two Houses of Congress on the basis of the "differing characteristics of the entities," but that "[a]t base, * * * the Framers' purpose was to protect individual rights." *Ibid.* The power to raise revenue was allocated to the "'immediate representatives of the people'" because it was "'the most complete and effectual weapon'" for obtaining "'a redress of every grievance, and for carrying into effect every just and salutary measure.'" *Ibid.* (citation omitted). The Court concluded that "[p]rovisions for the separation of powers within the Legislative Branch are * * * *not* different in kind from provisions concerning relations between the branches: both sets of provisions safeguard liberty." *Ibid.* (emphasis in original); see also *Davis* v. *Michigan Dep't of Treasury*, 109

S. Ct. at 1507 (rejecting the State's argument that an individual taxpayer could not claim the protection of the intergovernmental tax immunity doctrine in seeking a tax refund because the purpose of the doctrine was "to protect governments and not private entities or individuals").

The right of individuals under the Commerce Clause to participate in a national market free of discriminatory or burdensome state regulation is also both a structural rule, allocating regulatory authority between the federal and state governments, and a personal right, freeing all individuals from discriminatory state regulation not authorized by Congress. While it is true that the Court on occasion has characterized the Commerce Clause as a structural provision of the Constitution, the Court also has spoken in terms of an individual's "right" to engage in interstate commerce free of burdensome and discriminatory state regulation.

As early as *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824), Chief Justice Marshall recognized a "right" of constitutional dimensions to engage in "intercourse between state and state." Over the years, this Court has had frequent occasion to reemphasize that the right "[t]o carry on interstate commerce is not a franchise or a privilege granted by the State; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States." *Crutcher* v. *Kentucky*, 141 U.S. 47, 57 (1891); see also *Garrity* v. *New Jersey*, 385 U.S. 493, 500 (1967) ("[t]here are rights of constitutional stature whose exercise a State may not condition by the exaction of a price. Engaging in interstate commerce is one"); *Western Union Tel. Co.* v. *Kansas*, 216 U.S. 1, 48 (1910); *Crandall* v. *Nevada*, 73 U.S. (6 Wall.) 35, 49 (1867).

The dual character of the Commerce Clause is also supported by the historical record. While the Framers of the Constitution did refer to the need to prevent strife among the states as one justification for conferring the

commerce power upon the federal government, they also sought to protect individuals. Hamilton commented that one of the adverse consequences of continued "interfering and unneighborly regulation[]" by the states would be that "the citizens of each would at length come to be considered and treated by the others in no better light than that of foreigners and aliens." *The Federalist* No. 22, at 144-145 (Mentor ed. 1981); see also *The Federalist* No. 42, at 268 (J. Madison) (referring to the "unfair[ness]" of extraterritorial state regulation); 3 *The Records of the Federal Convention of 1787*, at 478 (M. Farrand ed. 1937) (Commerce Clause prevented "injustice among the States themselves").

Moreover, characterizing the Commerce Clause as solely a "structural" provision of the Constitution simply makes no sense. The Clause does not allocate power between the states and the federal government arbitrarily. Like the Origination Clause, the Commerce Clause allocates power in order to protect individual rights. It divests the states of authority to discriminate against or unjustifiably burden interstate commerce in the absence of congressional authorization in order to protect persons engaged in interstate commerce against unfair or discriminatory regulation by states in which they have no political voice. *Nippert* v. *City of Richmond*, 327 U.S. 416, 425-426, 434-435 (1946); *McGoldrick* v. *Berwind-White Co.*, 309 U.S. 33, 45 n.2 (1940). While Commerce Clause principles often are referred to as protections for "interstate commerce," that abstraction is simply a shorthand reference to the millions of individuals engaged in interstate commerce who are the daily beneficiaries of these rights. See, *e.g.*, *Healy* v. *Beer Institute, Inc.*, 109 S. Ct. 2491, 2499-2502 (1989) (discussing protections afforded to merchants engaged in interstate commerce); *American Trucking Associations, Inc.* v. *Scheiner*, 483 U.S. 266, 280-282 (1987).[8]

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[8] The principles embodied in the Commerce Clause thus bear no resemblance to rules that preempt state regulatory authority simply

Commerce Clause rights affect the liberty of American citizens to transact business on a national scale, free from burdens imposed by local legislatures that may be beholden to narrow, parochial interests. They are fundamental to the national citizenship that the Constitution was established to secure. Indeed, "[t]he entire Constitution was 'framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.'" *Healy*, 109 S. Ct. at 2499 n.12 (quoting *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935)). These basic rights surely are protected by Section 1983.[7]

3. Respondents assert (Br. in Opp. 11, 13) that Section 1983 should not provide a remedy for violations of "economic" rights. But this Court already has rejected the contention that Section 1983 protects "personal" rights and not property rights. As the Court remarked in *Lynch*, 405 U.S. at 552, "the dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. * * * [A] fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized."

to "maintain[] uniformity in the administration of * * * federal regulatory jurisdiction." *Golden State*, 110 S. Ct. at 451. Rather, the Commerce Clause limits state authority in order to protect persons engaged in interstate commerce against discriminatory and unreasonably burdensome regulation. Commerce Clause rules are substantive principles, not simply rules of administrative convenience.

[7] The rights conferred by the Commerce Clause should not be accorded lesser status because they may be overridden by congressional action. The same is true of the rights secured by federal "laws," which indisputably can form the basis for an action under Section 1983. As with statutory rights, the fact that Congress may eliminate a previously-existing Commerce Clause right is irrelevant when Congress has not acted. Such rights are fully enforceable as long as they exist, and therefore are cognizable under Section 1983. *Golden State*, 110 S. Ct. at 452.

Under this Court's decision in *Maine* v. *Thiboutot*, *supra*, federal statutes, including statutes that confer economic benefits, create rights cognizable under Section 1983. See, *e.g.*, *Wilder* v. *Virginia Hospital Ass'n*, 110 S. Ct. 2510 (1990). Indeed, the preemption claim at issue in *Golden State* was attacked on the ground that it was seeking to enforce an economic rather than a civil right, but the Court nonetheless held the claim cognizable under Section 1983. It would be anomalous indeed if the class of constitutional provisions giving rise to Section 1983 claims were drawn more narrowly.

CONCLUSION

The judgment of the Supreme Court of Nebraska should be reversed.

Respectfully submitted.

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